No. 14488

United States

Court of Appeals

for the Ninth Circuit

G. L. CURTIS COMPANY,

Appellant,

vs.

KENNETH S. HAMMES, Trustee in Bankruptcy of the Estate of ORACLE ENGINEERING AND SALES CORPORATION, a Corporation, Bankrupt,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the District of Arizona

TUCSON PTG. CO.

No. 14488

United States
Court of Appeals
for the Ninth Circuit

G. L. CURTIS COMPANY,

Appellant,

vs.

KENNETH S. HAMMES, Trustee in Bankruptcy of the Estate of ORACLE ENGINEERING AND SALES CORPORATION, a Corporation, Bankrupt,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the District of Arizona

TUCSON PTG. CO.

INDEX

TABLE OF CASES

TABLE OF CASES

STATUTES

TEXTS

ATTORNEYS OF RECORD

SCRUGGS & RUCKER

65 West Alameda Street,

Tucson, Arizona,

Attorneys for Appellant G. L. Curtis Company, Objecting Creditor.

RYLEY, CARLOCK & RALSTON,

514 Title and Trust Building,

Phoenix, Arizona,

Attorneys for Appellee, Kenneth S. Hammes, Trustee.

BASIS OF JURISDICTION

This is an appeal from a determination by the District Court of the United States for the District of Arizona of a controversy involving not less than $500.00 arising in proceedings under the National Bankruptcy Act of 1938 as amended (Title 11 U.S.C.). By the provisions of Section 2 of that act (Title 11 U.S.C. 11), the District Court is vested with original jurisdiction of proceedings under the National Bankruptcy Act. The particular question which is presented to this court of appeals came before the judge of the District Court on a petition for review (TR p3) filed pursuant to Section 39c of the Bankruptcy Act (11 U.S.C. 67) of an order entered by the referee in bankruptcy (TR p11) granting a petition to sell personal property (TR p. 20) filed by the receiver and certified to the District Court by the referee on a referee's certificate of review (TR p. 52) affirmed by the District Court June 21, 1954 (TR p. 55) from which the appellant appealed by notice of appeal (TR p. 56) filed July 14, 1954, pursuant to the provisions of section 24a of the Bankruptcy Act of 1938 as amended (11 U.S.C. 47) conferring appellate jurisdiction on the United States Court of Appeals over the courts of bankruptcy.

STATEMENT OF THE CASE

On March 6, 1952, G. L. Curtis Company disbursed for the use of Oracle Engineering and Sales Corporation the sum of $6,500.00 by delivering its check in said sum to M. E. Zetterholm and Ira L. Hart as Trustees (Exhibit 1 in evidence TR 19 marked exhibit B); that Oracle Engineering and Sales Corporation thereupon delivered to G. L. Curtis Company in consideration of such disbursement an instrument entitled Bill of Sale (Exhibit No. 3 in evidence; TR 16 to 18 inclusive marked exhibit A) wherein was described the steel here in question; that said steel was at that time in the possession of Allison Steel Manufacturing Company in Phoenix, Arizona. (TR 39 and 40) Prior thereto Allison Steel Manufacturing Company had received from Oracle Engineering and Sales Corporation possession of the steel herein involved for fabrication (TR 41). On March 14, 1952, Oracle Engineering and Sales Corporation sent to Allison Steel Manufacturing Company a letter (Exhibit No. 4 in evidence; Creditors exhibit No. 2 TR 45) notifying it of said transaction. Allison Steel Manufacturing Company acknowledged receipt of said notice in a letter directed to Oracle Engineering and Sales Corporation, marked exhibit 5 in evidence (Creditor's Exhibit No. 5 TR 46; Creditor's Exhibit No. 6 TR 47). At the time said notice was received the steel was on the books of Allison Steel Manufacturing Company on an account in the name of Oracle Engineering and Sales Corporation and the name of the account was not changed but the steel remained in the possession of Allison Steel Manufacturing Company

and is now in the possession of Allison Steel Manufacturing Company. The books of Allison Steel Manufacturing Company showed the steel stored for the account of Oracle Engineering and Sales Corporation commencing August 9, 1952. Allison Steel Manufacturing Company has a claim for handling charges and storage on said steel in the amount of $185.58 (Referee's statement of evidence—TR 39, 40 and 41). The duties of Ira L. Hart and M. E. Zetterholm as trustees in relation to the $6,500.00 paid to them were set out in a letter establishing a revolving account (Petitioner's exhibit No. 5 TR p. 48). Oracle Engineering and Sales Corporation filed an original petition under chapter X1 of the National Bankruptcy Act (11 U.S.C. 301 et seq) with the District Court o f the United States for the District of Arizona, on the 28th day of March, 1952. The matter was referred to Stanley A. Jerman, the referee in bankruptcy, on the 28th day of March, 1952. Kenneth S. Hammes, on the 14th day of April, 1952, was appointed receiver. An adjudication of bankruptcy was entered on the 24th day of July, 1953.

During the course of the proceedings, the receiver petitioned the referee for authority to sell the personal property stored at the plant of Allison Steel Manufacturing Company (TR p. 20). G. L. Curtis Company the appellant herein filed a petition seeking to have the referee determine the appellant to be the owner of the same personal property sought to be sold by the receiver and seeking an adjudication that the receiver had no right to the property (TR p. 14). G. L. Curtis Company also filed objections to the re-

ceiver's petition to sell said personal property (TR p. 30). After a hearing on said petitions and objections, G. L. Curtis Company filed its proposed findings and conclusions (TR p. 24) to which the receiver filed his objections (TR p. 33) and the receiver also filed his proposed findings and conclusions (TR p. 11) to which G. L. Curtis Company filed objections (TR p. 31) and to which objections the receiver replied(TR p. 55). Thereafter the referee entered his findings and order (TR p. 11) which were the findings and order proposed by the receiver, authorizing the receiver to sell the personal property set forth and specifically described in the various pleadings above referred to, and the referee held that G. L. Curtis Company had no valid claim to the personal property as against the receiver. From the ruling of the referee G. L. Curtis Company, the appellant herein, took a review to the judge of the District Court (TR p. 3) and the review was certified to the judge by the referee (TR p. 52) with all of the pleadings filed and a statement of the evidence (TR p. 39) and the exhibits introduced at the hearing. The review was heard by the District Judge (TR p. 55) and the referee was affirmed (TR p. 55). From the holding of the District Court the appellant has appealed.

In his findings and order the referee held: (TR p. 13).

That said bill of sale was given as a chattel mortgage and was unrecorded as of the time of the filing of the original petition herein.

That said chattel mortgage (bill of sale) is valid as between the parties appearing thereon but has no force and effect as against the receiver in bankruptcy herein.

G. L. Curtis contends that the referee and the District Court should have held:

I.

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act.

II.

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939.

III.

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of $6,500.00 paid by it to M. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

IV.

By the provisions of Section 62-523, ACA, 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not fraudulent or voidable by any creditor of the bankrupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act.

V.

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of $6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

SPECIFICATIONS OF ERROR

1. The court erred in holding to be a chattel mortgage the Bill of Sale given by Oracle Engineering and Sales Company to G. L. Curtis Company covering certain steel therein referred to for the reason that the possession of the steel referred to in said bill of sale was given to G. L. Curtis Company as security for the payment of $6,500.00 then advanced to Ira Hart and M. E. Zetterholm as trustees and by the provisions of 62-502 ACA 1939, constituted a pledge.

2. The court erred in holding the Bill of Sale found by the Court to be a chattel mortgage had no force and effect as against the Receiver in Bankruptcy for the reason that the transfer of personal property set forth in the Bill of Sale was given for a present fair consideration and was accompanied by an immediate delivery and followed by an actual and continuous change of possession.

3. The court erred in failing to hold that the letter written by Oracle Engineering and Sales Company to Allison Steel Manufacturing Company constituted an immediate delivery and an actual and continuous change of possession within the terms of 62-502 ACA 1939, for the reason that by the provisions of 52-849 ACA 1939 Allison Steel Manufacturing Company was a warehouseman and by the provisions of 52-835 ACA 1939, no creditor of the bankrupt nor the receiver could attach or levy upon

the personal property described in the Bill of Sale after said letter was received by Allison Steel Manufacturing Company and no purchaser from the bankrupts could have thereafter acquired any rights superior to the rights of G. L. Curtis Company.

4. The court erred in holding that the Bill of Sale found by the Court to be a chattel mortgage was required to be recorded to constitute a valid transfer from Oracle Engineering and Sales Company to G. L. Curtis Company as against creditors for the reason that by 62-523 ACA 1939, the Bill of Sale, though a chattel mortgage, accompanied by an immediate delivery and followed by an actual and continuous change of possession, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation.

5. The Court erred in holding that the chattel mortgage (Bill of Sale) has no force and effect as against the receiver in bankruptcy for the reason that said Bill of Sale constituted a pledge accompanied by an immediate delivery and followed by an actual and continuous change of possession for security for the performance of an act and was given for a present fair consideration and by the provisions of 62-523 ACA 1939 was not required to be recorded to be valid as to third persons.

6. The Court erred in affirming the action of the Referee ordering that the Receiver be authorized and permitted to sell or dispose of personal property described as

193	pcs 5/16"	Plate	18" x 72"—weight	22,147 lbs.
1	"	"	18" x 56"	89 lbs.
1	"	"	18" x 48"	77 lbs.
1	"	"	18" x 24"	38 lbs.
			Total weight	22,351 lbs.

free and clear of liens at public or private sale without notice to creditors and that Allison Steel Manufacturing Company release the personal property to the Receiver or his order upon payment to said company of their charges, in that said personal property before the filing of the petition for an arrangement under Chapter XI of the Bankruptcy Act in the District Court of the United States in and for the District of Arizona in this case had been pledged to G. L. Curtis Company for a present, fair consideration and possession of said personal property had been transferred from Oracle Engineering and Sales Corporation, the bankrupt, to the possession of G. L. Curtis Company prior to the filing of such petition for an arrangement under Chapter XI of the Bankruptcy Act.

7. The Court erred in affirming the action of the Referee denying the petition of G. L. Curtis Company for possession of personal property consisting of

193	pcs	5/16" Plate	18" x 72"—weight	22,147 lbs.
1	"	"	18" x 56"	89 lbs.
1	"	"	18" x 48"	77 lbs.
1	"	"	18" x 24"	38 lbs.
			Total weight	22,351 lbs.

and overruling the objection of G. L. Curtis Company to the sale of said property by the Receiver free and clear of any claim of lien of G. L. Curtis Company.

8. The Court erred in affirming the action of the Referee in refusing to make the following conclusions of law requested by appellant:

The Bill of Sale executed by Oracle Engineering and Sales

Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act.

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939.

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of $6,500.00 paid by it to M. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

By the provisions of Section 62-523, ACA, 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not fraudulent or voidable by any creditor of the bankrupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act.

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of $6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

9. The Court erred in holding that the Receiver was entitled to the possession of the personal property described in the Bill of Sale for the reason that said personal property had been transferred to G. L. Curtis Company, this appellant on account of a contemporaneous consideration accompanied by an immediate delivery and followed by an actual and continuous change of possession and said transfer had become so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract and no bonafide purchaser from the bankrupts could have acquired any rights in the personal property superior to those of the appellants.

PROPOSITIONS OF LAW

1. Notice to a bailee of a transfer of personal property to a third person given by the bailor of such personal property is a change of possession sufficient to validate a pledge.

2. Where a bailee recognizes a transfer to a third person by his bailor of personal property and thereafter holds such personal property for such third person, the third person becomes the bailor of such property and the bailee cannot thereafter transfer such property back to his original bailor without the direction of such third person.

3. Where a bailee acting as a warehouseman is advised by his bailor that the bailed property has been transferred to a third person, such transfer is effective against creditors of the first bailor, though the documentary evidence of the transaction is not recorded.

4. Where possession of personal property is delivered to a vendee named in a Bill of Sale given for the purpose of securing

the repayment of a loan, the transaction is a pledge and is enforceable against creditors even though not recorded.

5. A Bill of Sale found to be in fact a transfer to secure the payment of a loan though not recorded is valid and enforceable against creditors, where the personal property described in the Bill of Sale is delivered to the vendee named in the Bill of Sale.

6. A Bill of Sale held to be a chattel mortgage and not recorded, though defective in form to such an extent that it would be unenforceable as a chattel mortgage even though recorded, when accompanied by delivery of possession to the vendee of the personal property described in the Bill of Sale is enforceable against creditors.

7. Where no provision of state law requires a transfer on account of a contemporaneous consideration accompanied by an immediate delivery and followed by an actual and continuous change of possession to be filed or recorded to be effective against creditors the transfer shall be deemed to have been made or suffered at the time it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee and a receiver or trustee in bankruptcy would have no right to the property so transferred under any provision of the Bankruptcy Act.

8. Where no provision of state law requires a transfer on account of a contemporaneous consideration accompanied by an immediate delivery and followed by an actual and continuous change of possession to be filed or recorded in order for the transfer to be so far perfected that no bona fide purchaser from the debtor

could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee, a receiver in bankruptcy proceedings has no right to the possession of the property so transferred.

ARGUMENT

The only basis for any claim to right of disposal of the personal property which is the subject of the issue here must lie in the provisions of Section 70 of the Bankruptcy Act. The answer to the problem must be found in the state law. Matter of Turley 92 Fed. 2d 944; Corn Exchange Natl. Bank and Trust Co. vs Klauder 318 US 434. For convenience, the applicable portions of the Arizona statutes are here quoted: (Italics ours.)

62 ACA 502 Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, *except of personal property when accompanied by an actual change of possession,* which *is to be deemed a pledge.* The fact that the transfer was made subject to defeasance on a condition, may, to show such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice) though the fact does not appear by the terms of the instrument.

62-503 ACA 1939. A mortgage is a lien upon everything that would pass by a grant of the property, but does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage. After the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration. . . .

62-521 ACA 1939. No chattel mortgage shall have any legal force or effect except between the parties, unless the residence of the mortgagor and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, are set out in the mortgage and the mortgagor and mortgagee make affidavit that the mortgage is bona fide and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage.

62-523 ACA 1939. A chattel mortgage or *other instrument of writing intended to operate as a* mortgage or *lien upon personal property, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property* mortgaged or *pledged* by such instrument is *void as against the creditors of the* mortgagor or *person making the same* and as against subsequent purchasers and mortgagees or lien holders in good faith, *unless such instrument or a true copy thereof was forthwith filed in the office of the county recorder* of the county where the property was then situate. . . .

Since it is apparent that whether the transaction under consideration constituted a chattel mortgage or a pledge is not of importance until it is first determined if the execution of the Bill of Sale was accompanied by an immediate and followed by an actual and continued change of possession of the property which is the subject of this action, the character of the change of possession which occurred here will be first discussed.

To quote from Restatement of Security, Chapter 1, Section 8:

> "Where chattel is in the possession of a third person a pledge may be created by the assent of the pledgor and notification

by either pledgor or pledgee to the third person that the chattel has been pledged to the pledgee.

* * *

"Unless otherwise agreed, there is notification of the pledge to the third person in possession of the chattel to be pledged:

(a) "When the pledgor or pledgee states the fact of the pledge to the third person orally or in writing delivered to him personally. . . ."

This same thought is expressed in 8 C. J. S. Bailments, Section 32, p. 287:

The bailor may sell the subject matter of the bailment, subject to the special property of the bailee, and thereby confer on the purchaser an immediate and valid title thereto, the possession of the bailee becoming that of the purchaser, without any formal delivery of the subject of the bailment to him, a mere notice to the bailee of the sale being sufficient.

Indeed all the authorities point in the same direction: 72 CJS, Pledges, Section 19 (6) p. 23: In the absence of statute, it is immaterial to the validity of a pledge whether the pledgee himself holds the property or a third person holds it for him; and therefore, where all the parties agree that the property shall be held as security for the pledgee, delivery of possession, instead of being made directly to the pledgee, may be made to an agent or trustee of the pledgee; or by agreement, it may be delivered to, or left in the possession of a third person to hold for the pledgee, provided the third person has notice of the trust and accepts the obligation it imposes, and such third person may even be an agent, clerk, or servant of the pledgor. Where the property at the time of the pledge agreement is in the possession of a third person, the pledge may become effectual without further delivery on notification to the third person that the property has been pledged.
cf. Schram v. Sage, 46 Fed. Sup. 381.

In determining whether delivery was legally effective, the Court may take into consideration the character of the property,

the use to be made of it, the nature and object of the transaction and the position of the parties, Commonwealth Trust Co. of Pittsburgh vs. Reconstruction Finance Corp. 120 Fed. 2d 254.

It is on this theory of change of possession that field warehousing is sustained. 133 ALR 209. Likewise, the delivery of the goods to a depository or pledge holder will constitute such change of possession. Once he accepts the obligation he cannot exonerate himself without notice to all parties. 41 Am. Jur. Pledge and Collateral Security, Sec. 19, p. 399.

And what are the legal consequences when notification is given by the pledgor (bailor) to the third person (bailee), with respect to the pledged property as to the pledgee (new bailor)? To quote from 8 CJS, Bailments, Sec. 37, p. 303:

> "On termination of the bailment the bailee is ordinarily under an absolute duty to redeliver to his bailor the property bailed, in the original or altered form, or to account therefore in accordance with the provisions of their contract."

In the instant case the pledge holder (bailee) was acting without compensation from the date of the letters (TR 45, 46, 47, 48). Exhibits 2, 5 and 6) until August 9, 1952. Prior to the latter date the bailee had accepted the obligation to hold the property for the appellant. Thereafter he began making storage charges. While he made the charges against the bankrupts (the receiver) (the appellee here for all purposes) he had no authority to transfer the property back to the bankrupts after he had accepted the notification that he was to hold the property for G. L. Curtis. This is in accord with the accepted law: 41 Am. Jur., Pledge, Sec. 24, p. 602:

An unlawful recovery of possession by the pledgor does not affect the rights of the pledgee.

In Arizona the legislature has declared the policy for the warehouseman which, after all, is the law of bailments:

"52-806 ACA 1939.

A warehouseman, in the absence of some lawful excuse provided by this chapter is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

An offer to satisfy the warehouseman's lien;

An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and

A readiness and willingness to sign, when the goods are delivered, an acknowledgement that they have been delivered if such signature is requested by the warehouseman.

If the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

"52-835 ACA 1939.

A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor.

If the receipt is nonnegotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the trans-

feror or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor."

But since it might be urged that Allison Steel Manufacturing Company did not become a warehouseman under the definition of 52-849 ACA 1939: ". . . a warehouseman means a person lawfully engaged in the business of storing goods for profit," as that bailee did not commence charging for storage until August 9, 1952, long after the petition was filed in these proceedings under chapter XI of the Bankruptcy Act, let's look at the law and its requirements for recording or possession of the pledged property.

Generally, the rule is that taking possession of the mortgaged or pledged property is equivalent to recording and also cures defects which could not be cured by filing. Martin v. Holloway, 102 Pac. 3; Security etc. v. Sartori, 93 Pac. 2d. 863. Industrial Finance Co. v. Coppleman 284 Fed. 8. A change of possession is a sufficient substitute for recordation. Firestone Tire and Rubber Co. v. Cross, 17 Fed. 2d 417. In Arizona, the Supreme Court, in Moore v. Chilson, 224 Pac. 818, has stated it this way:

This statute contemplates two classes of persons both claiming, each upon a different base, the first payment of their demands out of the same fund, and undertakes to fix and define the rights of each, the mortgagee on the one side and the creditors on the other. As between the parties to the contract, the mere execution and delivery of the mortgage is sufficient to invest the mortgagee

with all the rights which that instrument purports to convey. When the mortgagor contracts debts, which he cannot pay without recourse to the property which he has already covered by mortgage, his legal obligation under the mortgage is not relaxed merely because the mortgage has not been filed for record. This provision, and the consequences which inevitably flow from it, must be given effect in construing the statute as applied to the rights of the other class, the creditors. As to them it is said the mortgage is absolutely void unless promptly filed for record, or unless there is an immediate change of possession of the property; that is, unless with the delivery of the mortgage to the mortgagee, the mortgagor shall also deliver to him the chattels mortgaged, or, in lieu of that, file for record forthwith the instrument of conveyance, so that by the one means or the other the public or that part of the public which transacts business with the mortgagor, may have a means of knowing who owns the property, and what right or interest the mortgagor may have in it. The device of filing papers for record, and making such filing constructive notice to all concerned, is of comparatively recent origin. Formerly the only means known or employed for giving notice to third persons of ownership in chattels was by actual possession. The substitution for such possession of a filing for record is in fact and in law equivalent. Ruggles v. Cannedy, 127 CA1, 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371.

The statute by its express terms treats the two as of equal import and effect, since the passage of recording statutes, following the rule which the courts had established before that time, that a lien which was void because it was secret on account of the failure to deliver possession of the property involved became valid and established as soon as there was a transfer of possession, as against all persons who had not in the meantime acquired some specific interest in or lien upon the property. Jones on Chattel Mortgages (5th Ed.) 178. While the change of possession of the chattels is actual notice to all the world, the filing for record is by law made equally effective as constructive notice, and there would appear to

be no sound reason why a deferred filing of the chattel mortgage should not have the same force and effect as the deferred transfer of actual possession of the chattels mortgaged.

Since we have change of possession, and notice to bailee, what is the nature of the transaction? That is, is it one which requires filing of a chattel mortgage to be effective against creditors as was held by the referee and affirmed by the District Judge?

By the provisions of 62-502 ACA 1939:

Every transfer . . . of personal property when accompanied by an actual change of possession . . . is to be deemed a pledge.

A pledge is really one of the simplest forms of security. It is the passing of the possession of a chattel by the owner thereof to the pledgee who is thereby entitled to hold it until the debt is paid or the obligation performed. Campbell vs. Peter 162, Pac. 2d, 754. Also see 41 Am. Jur., Pledge. Nor is the form of the instrument important, nor even its language, but its legal effect which determines its nature. Holdren vs. Peterson, 82 Pac., 2d, 1097.

The validity of the pledge and the question whether sufficient delivery has been made are matters for the law of the state where the property was situated when pledged. Security Warehousing vs. Hand, 206, US 415.

The referee found the Bill of Sale executed for a present fair consideration accompanied by a delivery of the property sold to be a chattel mortgage. That a Bill of Sale can be found to operate as a chattel mortgage is well established. The law on this subject is reviewed and annotated in 33 ALR 2d. p. 364 et seq. The referee then held that the chattel mortgage was not valid as against creditors though good as between the parties. Without

regard to the form of the Bill of Sale and what effect a recording thereof would have had on the question of notice because of such imperfections, and the distinctions of recording in the recorder's office as between a Bill of Sale and a chattel mortgage, the question arises: Was a filing for record necessary to make the chattel mortgage valid? Again under the law of Arizona where there is a change of delivery of the property and change of possession, no filing or recording is necessary. 62-523 ACA 1939. As pointed out in Barber vs. Reina Nash, etc. 260 Pac. 2d. 931, the imperfections of the Bill of Sale as a chattel mortgage would be cured by delivery and possession, although recording would not cure such faults. However, it is not necessary to labor these points. There is no necessity to raise the pledge from its simplest form to a more formal instrument. A pledge need not be in writing and no particular form is required. All that is necessary is a loan of money to the pledgor and a delivery of property to the pledgee to secure the repayment of the loan, the pledgee to retain possession until the loan is paid or condition performed. Columbia Co. v. Sodini 156, Pac. 2d 524, Isak V. Jorney 15, Pac. 2d 1069.

Since it is manifest that no creditor of the bankrupts at the time of the transfer of the steel to the appellant could have obtained by legal or equitable proceedings upon a simple contract a lien superior to the lien of G. L. Curtis Company upon the property, which is the subject of this dispute, under the applicable state law, it follows that under the provisions of Section 70, 60 and 67 of the Bankruptcy Act (11 USC 110, 96, 107) the receiver has no right to the property and that the court should have found that the property should be delivered to G. L. Curtis Company by

the receiver. To follow the tortious language of the Bankruptcy Act the only way a receiver could get at the property would be to start with the provisions of Section 67 which in effect provide that when a transfer is required to be recorded or filed to affect creditors of a bankrupt and such a transfer is not recorded or filed then the transfer is deemed to have been made immediately before the filing of the petition. To quote 67d (5):

> For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act it shall be deemed to have been made immediately before the filing of such petition.

Then after finding that a filing or recording is necessary to perfect the transfer it is necessary to go back to the provisions of Section 60 and find that the transfer though made at the time the consideration was paid was not perfected until the filing of the petition initiating the proceeding and was therefore given for an antecedent debt (by operation of law but without regard to fact) and was by the provisions of Section 67d (5) within the four months period and therefore void. As stated in Collier on Bankruptcy 67.40, page 411:

> Does 67d (5) convert a transfer by the debtor for a present consideration into a transfer for an antecedent debt merely because the transfer is perfected subsequently to the giving of the consideration by the third person? An affirmative

answer is demanded by the literal language of the provision, the legislative history and the intent of the draftsmen to strike at secret transfers.

So the whole problem remains tied to the meaning of Sections 62-502, 503, 521, 523, 530 ACA, 1939 and the law of bailments and pledges above discussed. It is submitted the judgment of the District Court was in error and should be reversed.

Respectfully Submitted

EDWARD W. SCRUGGS

EDGAR F. RUCKER

Attorneys for the Appellant

65 W. Alameda Street

Tucson, Arizona